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U.S. Citizenship  
and Immigration  
Services

FILE: WAC 03 113 54641 Office: CALIFORNIA SERVICE CENTER Date: JUL 06 2004

IN RE: Petitioner:  
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

**INSTRUCTIONS:**

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Mari Pluon*

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a corporation that owns and operates care home facilities that provide intermediate care for developmentally disabled patients/residents. In order to employ the beneficiary as a qualified mental retardation professional (QMRP), the petitioner endeavors to classify her as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition on two independent grounds, namely, that the petitioner had failed to establish that (1) the proffered position meets the definition of a specialty occupation at 8 C.F.R. § 214.2(h)(4)(iii)(A), and (2) the beneficiary is qualified to serve in a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(C).

On appeal, counsel contends that the evidence does not support denial of the petition on either of the grounds cited by the director. The main thrusts of counsel's brief are that (1) the evidence of record is sufficient to establish that the beneficiary would be employed as a QMRP as defined by California law, (2) California law requires that QMRP positions be held by persons with at least a bachelor's degree, and (3) the beneficiary is qualified to serve in the proffered QMRP because she holds a foreign degree that is equivalent to a U.S. bachelor's of nursing degree.

In reaching its decision, the AAO reviewed the entire record, including: (1) the petitioner's Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the matters submitted in response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief.

Upon consideration of the entire record, the AAO has concluded that the director was correct in denying THE petition on the second ground.

The first issue to be addressed is the failure of the evidence to establish a specialty occupation in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(A).

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The director erred in finding that the evidence of record failed to provide an adequate description of the proposed duties. Counsel correctly asserted that the proposed duties were adequately described and that they comport with the QMRP position as addressed in California law.

Upon review of (1) the petitioner's description of the QMRP duties in its February 13, 2003 letter submitted with the Form I-129 and (2) the provisions at Title 22 of the California Code of Regulations (CCR) relevant to the mandatory duties and responsibilities of the QMRP, the AAO has determined that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. Accordingly, the proffered position qualifies as a specialty occupation in accordance with section 4 of 8 C.F.R. § 214.2(h)(4)(iii)(A). This portion of the director's decision is withdrawn.

The next issue for determination is whether the record has established that the beneficiary is qualified to serve in the QMRP specialty occupation. The director incorrectly determined that the beneficiary is not qualified because the duties could be performed by an individual with an associate degree. The fact that an individual with a lesser degree could perform the duties of the occupation is irrelevant. The beneficiary is not qualified to perform the duties of the proffered position because she is not licensed to practice as a nurse.

Section 214(i)(2)(A) of the Act, 8 U.S.C. § 1184(i)(2)(A), states that an alien applying for classification as an H-1B nonimmigrant worker must possess "full state licensure to practice in the occupation, if such licensure is required to practice in the occupation." Pursuant to 8 C.F.R. § 214.2(h)(4)(v)(A), if an occupation requires a state or local license for an individual to fully perform the duties of the occupation, an alien (except an H-1C nurse) seeking H classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the United States and immediately engage in employment in the occupation. As discussed below, the QMRP position requires that the beneficiary hold a California license as a registered nurse, but the evidence of record does not establish that the beneficiary holds that license. Consequently, the

petitioner has not established that the beneficiary is qualified to serve in the specialty occupation that it is proffering.

The decisive sections of the California regulations are at sections 76135, 76830, and 76139(a) of Title 22, of the CCR. These provisions define the QMRP qualifications and the term "registered nurse."

Title 22, section 76135 states, "'Qualified mental retardation professional' means a person who is a physician, psychologist, social worker, special education teacher, physical or occupational therapist, speech pathologist or audiologist, *registered nurse*, rehabilitation counselor, or recreation therapist and who has at least one year's experience or training in the care of the developmentally disabled." (Emphasis added.) Section 76830 expands on the definition as follows:

(a) Qualified mental retardation professional means a person who has specialized training or one (1) year of experience in treating or working with the developmentally disabled and is one of the following:

- (1) A person with a master's degree in psychology.
- (2) A physician.
- (3) An educator with a degree in education.
- (4) A social worker with a bachelor's degree in:
  - (A) Social work from an accredited program; or
  - (B) A field other than social work and at least three (3) years of social work experience under the supervision of a social worker with a master's degree.
- (5) A physical therapist.
- (6) An occupational therapist.
- (7) A speech pathologist.
- (8) An audiologist.
- (9) *A registered nurse.*
- (10) A recreation therapist.
- (11) A rehabilitation counselor. [Emphasis added.]

Title 22, section 76139(a) states, "'Registered nurse' means a person licensed as such by the California Board of Registered Nursing."

The record indicates that only the "registered nurse" provision of sections 76135 and 76830 are relevant to the beneficiary's educational background.

Counsel does not dispute that the pertinent part of the CCR states that to qualify for a QMRP position the beneficiary would have to be a registered nurse. Without citing any authority for his interpretation, counsel maintains, however, that, in light of the types of occupational qualifications listed by the state for the QMRP position, "registered nurse" means a person with a U.S. bachelor's degree in nursing or an equivalent foreign degree. Accordingly, counsel contends that the beneficiary is qualified to serve by virtue of her holding a foreign degree that has been evaluated to be the equivalent of a U.S. bachelor's degree in nursing.

The relevant sections of the CCR clearly and unambiguously require that, to qualify under the nurse category for a QMRP, a person must hold a California license to practice as a registered nurse. As counsel's contention to the contrary contradicts the plain meaning of the relevant regulations and is unsupported by any legal authority, it is without merit.

As there is no evidence in the record that the beneficiary is licensed as a registered nurse by the State of California, the petitioner has not established that the beneficiary is qualified to serve in the QMRP specialty occupation.

In summary, the director was correct in denying the petition on one of the two grounds on which he based his decision, namely, that the record has not established that the beneficiary is qualified to serve in a specialty occupation. Therefore, the director's decision shall not be disturbed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.